FILED
JAN 29 2001
CLERK

(4)

No. 00-1052

IN THE

Supreme Court of the United States

UTILITIES COMMISSION,
CITY OF NEW SMYRNA BEACH, FLORIDA,

Petitioner,

v.

TAMPA ELECTRIC COMPANY, FLORIDA POWER & LIGHT COMPANY, and FLORIDA POWER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENT TAMPA ELECTRIC COMPANY

SHEILA MCDEVITT*
Vice-President and General Counsel
HARRY W. LONG, JR.
Assistant General Counsel
TAMPA ELECTRIC COMPANY
Attorneys for Respondent Tampa Electric Company
Post Office Box 111
Tampa, FL 33601-0111
(813) 228-1804

* *Counsel of Record*

164921

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Tampa Electric Company, is a wholly-owned subsidiary of TECO Energy Inc. which is publicly traded.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Reasons for Denying the Writ	1
Statement of the Case	3
Argument	9
I. Congress Has Explicitly Left To The States Precisely The Authority Exercised By The State Of Florida Under FEECA And The Siting Act	9
II. There Is No Scheme Of Federal Regulation With Regard To The Siting, Need Certification And Environmental Regulation Of Electrical Power Plants So Pervasive As To Make Reasonable The Inference That Congress Has Implicitly Preempted State Attempts To Regulate Such Matters	12
III. Neither The FEECA Nor The Siting Act Creates A Discriminatory Burden On Interstate Commerce That Is Cognizable Under The Dormant Commerce Clause Doctrine	16
Conclusion	20

TABLE OF CITED AUTHORITES

Page

Cases:

Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission, 461 U.S. 375 (1983) 13

Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 10

Collins v. American Buslines, Inc., 350 U.S. 528 (1956) 17

Delaney v. State, 190 So. 2d 578 (Fla. 1966) 8

Empire Power Co. v. Duke Power Co., 112 N.C. App. 643, 437 S.E. 2d 540 (Ct. App. 1993) 9

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 10, 17

General Motors Corporation v. Roger W. Tracy, Tax Commissioner of Ohio, 519 U.S. 278 (1997) 2, 17, 18, 19

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 12

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 17

Cited Authorities

Page

Huron Portland Cement Company v. City of Detroit, Michigan, 362 U.S. 440 (1960) 13, 17

In re: Petition of Nassau Power Corp., PUC Lexis1557, Order No. PSC-92-1210-FOF-EQ (PSC Oct. 26, 1992) 5

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 12

Monongahela Power Company, Docket No. ER-87-330-001, 40 F.E.R.C. ¶61 (Sept. 17, 1987) 11

Munn v. Illinois, 94 U.S. 113 (1877) 13

Nassau Power Corp. v. Beard, 601 So. 2d 1175 (Fla. 1992) 5

Nassau Power Corp. v. Deason, 641 So. 2d 396 (Fla. 1994) 5

Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) 2, 13, 15, 16

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 13

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 12

Cited Authorities

	Page
Savage v. Jones, 225 U.S. 501 (1912)	13
Tampa Electric Co., et al. v. Joe Garcia, et al., 767 So. 2d 428 (Fla. 2000)	1, 2, 5
Statutes:	
42 U.S.C.A. § 2011, *et seq*	14
43 U.S.C. § 2021(k)	14
Florida Statutes:	
§ 366.03	7
§§ 366.80 – 366.85	1
§§ 403.501 – 403.518	1
§ 403.502	3
§ 403.502(2)	3
§ 403.503(12)	4
§ 403.503(13)	5
§ 403.506	4, 5
§ 403.508(3)	6
§ 403.519	1, 6

Cited Authorities

	Page
Ch. 73-33, § 1, Laws of Fla.	1
Ch. 80-65, § 5, Laws of Fla.	1
Pub. L. 102-486, 106 Stat. 2776 (1992)	1
Pub. L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776 (Oct. 24, 1992) .	10
Rules:	
Rule 25-22.082(1)(b), F.A.C.	7
Rule 25-22.082(2), F.A.C.	7

REASONS FOR DENYING THE WRIT

The Utilities Commission, City of New Smyrna Beach, Florida ("New Smyrna" or "Petitioner") has urged this Court to review and, ultimately, reverse the decision of the Florida Supreme Court in the case of *Tampa Electric Co., et al. v. Joe Garcia, et al.*, 767 So. 2d 428 (Fla. 2000). The gravamen of New Smyrna's Petition For Certiorari (the "Petition") is that the Florida Electrical Power Plant Siting Act[1] ("Siting Act") and the Florida Energy Efficiency and Conservation Act ("FEECA")[2], as interpreted by the Florida Supreme Court in *Garcia*, supra., are unconstitutional under the Commerce Clause of the United States Constitution. As discussed below, New Smyrna has failed to identify in its Petition a single federal statute or regulation that expressly preempts the State of Florida's exercise of authority under the Siting Act or FEECA. In fact, Congress, expressly and unambiguously manifested its intent in the Energy Policy Act 1992[3] ("Energy Policy Act"), to leave the jobs of siting power plants and managing associated environmental protection issues to the states, *without federal interference.*

New Smyrna's response to the obvious lack of Congressional preemptive intent evidenced in the Energy Policy Act is to argue, in the alternative, that the Siting Act is unconstitutional under the dormant or negative Commerce Clause doctrine. This argument is based on the erroneous

---

1. Ch. 73-33, § 1 at 73, Laws of Fla.; §§ 403.501 – 403.518, Fla. Stat.

2. Ch. 80-65, § 5; §§ 366.80 – 366.85 and 403.519, Fla. Stat.

3. Pub. L. 102-486, 106 Stat. 2776 (1992)

assertion that FEECA and the Siting Act are simply exercises in economic protectionism by the State of Florida that are intended to discriminate against out-of-state independent power producers who wish to construct and operate electric generation in Florida. However, the plain language of the Siting Act and the manner in which it has been implemented by the State belie New Smyrna's characterization of that alleged purpose. In addition, neither FEECA nor the Siting Act have any discriminatory impact on interstate commerce that is cognizable under the dormant commerce clause doctrine. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *see also General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

Finally, as is the case in many other states, Florida is currently engaged in a comprehensive review of its electric industry structure. Shortly after the Florida Supreme Court issued its decision in *Garcia,* the Governor of Florida issued an Executive Order[4] establishing the Florida Energy 2020 Study Commission ("2020 Commission") whose charter is to assess Florida's energy needs over the next 20 years. Based on this assessment, the 2020 Commission will propose changes in the current energy regulatory framework to the Florida Legislature that will optimize the state's ability to meet its future energy needs. While it may be appropriate, as a matter of legislative policy, to consider how merchant power plants might play a useful role in a competitive environment where the market design and applicable regulations create a "level playing field" for all market participants, the current regulatory structure does not define

4. State of Florida, Office of the Governor, Executive Order No. 00-127, May 3, 2000.

a role for such plants. The Company has shared with the 2020 Commission its views on how merchant plants might be integrated into a new state electric regulatory structure. However, Tampa Electric respectfully submits that the nature and scope of changes in the existing law in Florida with regard to the siting of power plants and the electric regulatory structure in general, are matters to be addressed by the Florida Legislature in an exercise of the police powers traditionally reserved to the states. Given the fluid nature of the current regulatory debate in Florida, the Court's review of the issues raised in the Petition would be premature and perhaps unnecessary.

STATEMENT OF THE CASE

There is no need to guess at the legislative intent behind the Siting Act[5]. Section 403.502(2), Fla. Stat., specifies, in

---

5. *See* § 403.502 Legislative Intent – The Legislature finds that the present and predicted growth in electric power demands in this state requires the development of a procedure for the selection and utilization of sites for electrical generating facilities and the identification of a state position with respect to each proposed site. The Legislature recognizes that the selection of sites and the routing of associated transmission lines will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the State. The Legislature finds that the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated and all permit decisions could be reviewed on the basis of standards and recommendations of the deciding agencies. It is the policy of this state that, while recognizing the pressing need for increased power generation facilities, the state shall insure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse affects on human health,, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their (Cont'd)

relevant part, that the Siting Act is intended "to effect a reasonable balance between the need for the facility and the environmental impact resulting from construction and operation of the facility . . .". Recognizing that the construction of any power plant is likely to have environmental consequences, the Siting Act is intended to ensure that such consequences are not imposed on the state unless there is a sufficient need for a proposed power plant. This explicit balancing of need for new generation against the environmental consequences of siting a new power plant is the essence of the Siting Act process.

The FEECA/Siting Act process is clear and straightforward. Any construction of new, non-exempt[6] electrical power plants[7] or any expansion of the steam

---

(Cont'd)
aquatic life and will not unduly conflict with the goals established by the applicable local comprehensive plans. It is the intent to seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public. . . .

6. Under § 403.506, Fla. Stat., electrical power plants or steam generating plants of less than 75 megawatts in capacity are exempt from the certification requirements of the Siting Act.

7. An "electrical power plant" is further defined in § 403.503(12), Fla. Stat., for the purpose of certification as:

> . . . any steam or solar electrical generating facility using any process or fuel, including nuclear materials, and includes associated facilities which directly support the construction and operation of the electrical power plant and those associated transmission lines which connect

(Cont'd)

capacity of existing electrical power plants requires prior certification under the Siting Act[8]. Under settled Florida law[9], as reiterated by the Florida Supreme Court in *Garcia, supra*, only electric utilities[10], such as Tampa Electric and New Smyrna, who, by definition, have a public utility obligation to serve retail electric customers in Florida, can qualify as applicants under FEECA and the Siting Act. Other generators, who have no obligation to serve retail customers in Florida but may have an interest in producing and selling power for the wholesale electric market, are not precluded from doing so under state law. Such wholesale generators are free to construct and operate plants that are exempt under the Siting Act. In the alternative, wholesale generators can participate in the FEECA and Siting Act process as co-applicants with Florida retail utilities simply by committing the output of their proposed plant to serve the specified need of one or more Florida retail utilities. The FEECA/Siting

---

(Cont'd)

> the electrical power plant to an existing transmission network or rights-of-way to which the applicant intends to connect, *except that this term does not include any steam or solar electrical generating facility of less than 75 megawatts in capacity unless the applicant for such a facility elects to apply for certification under this act* . . . (emphasis added)

8. *See* § 403.506, Fla. Stat.

9. *See Nassau Power Corp. v. Beard*, 601 So. 2d 1175 (Fla. 1992); *In re: Petition of Nassau Power Corp.*, PUC Lexis 1557, Order No. PSC-92-1210-FOF-EQ (PSC Oct. 26, 1992); *Nassau Power Corp. v. Deason*, 641 So. 2d 396 (Fla. 1994)

10. *See* § 403.503(13), Fla. Stat.

Act process is non-discriminatory in that it bars retail utilities and wholesale generators alike from obtaining certification for non-exempt generation facilities unless the output of the proposed facility is tied to a specific, substantiated retail need for electric power.

The Florida Public Service Commission ("FPSC") has the responsibility under FEECA[11] and the Siting Act[12] to determine whether: (1) the proposed generation is needed by an electric utility to meet its obligation to serve retail customers; (2) whether the proposed project will satisfy the identified need; and (3) whether the proposed project is the most cost-effective means of meeting the identified need. The FPSC is also required, in making its recommendation, to consider the "conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant . . ."[13]. The FPSC's findings, along with the other environmental and project information adduced during the process, are delivered to the Governor and Cabinet who must strike the final balance between the need for the proposed facility and the environmental impact associated with the construction and operation of the facility.

It is important to understand that the FEECA/Siting Act process does not exist in a vacuum. To the contrary, these elements of the Florida Statutes are part of a comprehensive

---

11. § 403.519, Fla. Stat.

12. § 403.508(3), Fla. Stat.

13. § 403.519, Fla. Stat

state regulatory framework that has been designed to ensure reliable, cost-effective and environmentally responsible electric service. As part of its obligation to serve, Tampa Electric, like other utilities serving retail customers in Florida, must anticipate customer demand for electric energy and plan, well in advance, to meet that anticipated demand either through increased conservation, new generation or firm long-term power purchase agreements with other generators[14]. Investor-owned utilities, such as Tampa Electric, who propose to meet anticipated customer demand through the construction of new generation, must evaluate alternatives to its proposed power plant by issuing a Request For Proposals[15] ("RFP") *prior to applying for certification under the FEECA/Siting Act process*[16]. The RFP process is open and non-discriminatory. Any in-state or out-of-state generator has the opportunity to respond to the RFP and propose a more economic supply alternative, from either existing or proposed generation. The utility issuing the RFP must accept the most cost effective RFP response unless it can demonstrate that its proposed generation is, in fact, the most cost effective means of meeting anticipated retail customer demand.

It is against this regulatory backdrop that New Smyrna and Duke Energy New Smyrna Beach Power Co., Ltd.

---

14. *See* § 366.03, Fla. Stat.

15. *See* Rule 25-22.082(1)(b), F.A.C., where an RFP is defined as *a document in which the investor-owned utility publishes the price and non-price attributes of its next planned generating unit in order to solicit and screen, for subsequent contract negotiations, competitive proposals for the utility's next planned generating unit.*

16. *See* Rule 25-22.082(2), F.A.C.

("Duke") filed a joint petition with the FPSC in August of 1998, for a determination of need for the New Smyrna Beach Power Project, a proposed natural gas fired combined cycle generating plant with 514 megawatts of capacity to be built, owned and operated by Duke at a site in Volusia County, Florida. Duke is an affiliate of Duke Power Company, a North Carolina-based investor owned electric utility. As an Exempt Wholesale Generator ("EWG") subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), Duke is not subject to the jurisdiction of the FPSC and has no public utility obligation to serve retail customers in Florida. Of the 514 megawatts of capacity represented by Duke's proposed plant, only 30 megawatts were committed to be sold to New Smyrna to serve its retail load. The balance of the proposed plant capacity was to remain uncommitted and available for sale on the wholesale power market.

In concluding that the FPSC had acted beyond the scope of authority granted to it by the Florida Legislature in finding Duke to be a qualified applicant under the Siting Act, the Florida Supreme Court held in *Garcia* that the "*statutory scheme embodied in the Siting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates.*"[17] The Court

17. As noted above, the Florida Supreme Court's ruling on this point was simply a reiteration of its holdings in the Nassau cases, supra. In Florida, as in most other states, it is established law that in reenacting a statute, the Legislature is presumed to be aware of the constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions. *Delaney v. State*, 190 So. 2d 578, 581-82 (Fla. 1966). The Florida Legislature re-enacted FEECA and the Siting Act subsequent to the State Supreme Court's interpretation of those statutes, without any relevant change.

went on to note that "*the Legislature must enact express statutory criteria if it intends such authority for the [F]PSC. Pursuant only to such legislative action will the [F]PSC be authorized to consider the advent of the competitive market in wholesale power promoted by recent federal initiatives. Such statutory criteria are necessary if the Florida regulatory procedures are intended to cover this evolution in the electric power industry.*"[18]

ARGUMENT

I.

Congress Has Explicitly Left To The States Precisely The Authority Exercised By The State Of Florida Under FEECA And The Siting Act

New Smyrna broadly asserts in its Petition that FEECA and the Siting Act *conflict* with the federal policy inherent in the Energy Policy Act and FERC Order No. 888 to promote competition in the wholesale generation market. However, New Smyrna fails to identify in its Petition any federal statute or regulation that explicitly preempts Florida's exercise of authority with regard to the environmental regulation, need certification and siting of new electric generating plants. As this Court has frequently indicated, preemption of state law by federal statute or regulation is not favored in the

---

18. The Court noted that in this regard, its decision in *Garcia* was consistent with the conclusion of the North Carolina Utilities Commission, which dismissed a similar petition by an independent power producer that proposed a merchant plant in North Carolina that was opposed by Duke Power Company. The North Carolina Commission's opinion was affirmed on appeal. *Empire Power Co. v. Duke Power Co.*, 112 N.C. App. 643, 437 S.E. 2d 540 (Ct. App. 1993).

absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained. *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). It is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

New Smyrna's assertions fail to meet even the threshold test for establishing preemption. There is no conflict between federal law and the State's exercise of authority under FEECA and the Siting Act. The Energy Policy Act explicitly reserves to the states the authority to regulate matters that New Symrna urges this Court to conclude are reserved exclusively to the federal government. Section 731 of the Energy Policy Act provides that:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or *in any way to interfere with*, the authority of any state or local government relating to environmental protection or the siting of facilities.[19]

(Emphasis added).

The Petitioner's only attempt to rebut this obviously controlling and conclusive statement of Congressional intent is the suggestion that the need certification process under FEECA is "not part of the balancing of environmental

---

19. P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776 (Oct. 24, 1992)

impact" addressed in section 731. However, as discussed above, the statement of Legislative intent underlying the Siting Act leaves no doubt that the evaluation of need is inextricably linked with the environmental evaluation of proposed power plant projects for which certification is sought under the Siting Act. The balancing of need for new generation to serve retail electric customers against the environmental consequences of siting such new generation lies at the heart of the FEECA/Siting Act process. One element of the equation would be meaningless without the other, given the stated purpose of these Florida statutes.

New Smyrna's assertions with regard to the significance of FERC Order No. 888 are equally unfounded. While one of the purposes underlying Order No. 888 is the promotion of increased competition in the wholesale generation market, the Order deals only with the issue of open access to electric transmission facilities. Furthermore, FERC has acknowledged that it has no jurisdiction with regard to capacity planning, determination of power needs, plant siting, licensing, construction or operations in light of Congress's specific reservation of authority over such matters to the States. *Monongahela Power Company, Docket No. ER-87-330-001*, 40 F.E.R.C. ¶61 (Sept. 17, 1987). Tampa Electric respectfully suggests that review by this Court is unwarranted and unnecessary in light of Congress's explicitly and unambiguously stated intention to leave to the states the authority to regulate the matters addressed under FEECA and the Siting Act.

II.

There Is No Scheme Of Federal Regulation With Regard To The Siting, Need Certification And Environmental Regulation Of Electrical Power Plants So Pervasive As To Make Reasonable The Inference That Congress Has Implicitly Preempted State Attempts To Regulate Such Matters

As an alternative to its fatally flawed assertion of explicit preemption, New Smyrna argues that FEECA and the Siting Act are preempted under a dormant Commerce Clause theory since those state statutes allegedly frustrate the Congressional intent underlying the Energy Policy Act and create a discriminatory burden on interstate commerce. However, this alternative theory is also untenable. In the absence of express preemptive language, Congress's intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). No such conclusion can be reached in this case.

Where the field that Congress is said to have preempted has been traditionally occupied by the states this Court has started with the assumption that the historic police powers of the States were not to be superseded by the Federal act unless that was the clear and manifest purpose of Congress. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). *Cf. Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (deference to state regulation of safety under dormant

commerce clause); *Huron Portland Cement Company V. City of Detroit, Michigan*, 362 U.S. 440 (1960) (City smoke abatement ordinance enforced against federally licensed and inspected vessels found to be constitutional under dormant commerce clause analysis).

This Court has long regarded the regulation of utilities to be one of the most important of the functions traditionally associated with the police power of the States. *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), referring to *Munn v. Illinois*, 94 U.S. 113 (1877). In the absence of conflicting legislation, this Court has concluded that the states retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected. *See Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440 (1978). In determining whether state regulation has been preempted by federal action, congressional intent to supersede state law is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. *Huron Portland Cement, supra; Savage v. Jones*, 225 U.S. 501 (1912).

Under facts directly analogous to those presented in this case, this Court found state regulatory legislation that created a moratorium on the construction of new nuclear power plants to be constitutional, despite a clear statement of Congressional intent to promote the construction of such power plants. In the case of *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), this Court reviewed a California law that imposed a moratorium on the construction of new nuclear power plants until such time as the federal

government had approved a demonstrated technology or means for permanent disposal of nuclear waste. In evaluating the constitutionality of this statutory provision, this Court first examined the intent of the state statute and the Congressional intent underlying the Atomic Energy Act of 1954[20], the federal statute on which the state statute allegedly infringed. Based on its analysis, this Court concluded that the primary purpose of the Atomic Energy Act was to insure that nuclear technology would be safe enough for widespread development and use, thereby promoting the construction of nuclear power plants[21]. Therefore, this Court reasoned, had the California nuclear power plant moratorium been based on state concerns with regard to the safety of nuclear plants, it would have been preempted. However, the record clearly demonstrated that the basis for the moratorium was an economic, rather than a safety concern on the part of the state.

The state believed that the lack of a federally approved method of nuclear waste disposal created a "clog" in the nuclear fuel cycle. Without a permanent means of disposal, the state believed that the nuclear waste problem would become critical, leading to unpredictably high costs to contain the problem at the expense of California electric ratepayers and/or taxpayers. Given the non-safety purpose underlying the state moratorium, the Court upheld the

---

20. § 1, *et seq.*, as amended, 42 U.S.C.A. § 2011, *et seq.*

21. The Court noted that § 274(k) of the Act, 43 U.S.C. § 2021(k) provides that: ***Nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.***

constitutionality of the state statute[22]. In so doing, the Court stated that "the states have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a state so inclined to halt the construction of new nuclear plants by refusing on economic grounds to issue certificates of public convenience in individual proceedings"[23]. The Court noted that while California is certainly free to make such decisions on a case-by-case basis, a state is not foreclosed from reaching the same decision through a legislative judgment, applicable to all cases[24]. Finally, this Court noted that

> . . . the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress.[25]

---

22. This Court determined that Congress, in passing the Atomic Energy Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the states retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns. 461 U.S. 190, 205.

23. *Id.* at 216.

24. *Id.* at 215.

25. *Id.* at 223.

Using the same analysis applied by the Court in *Pacific Gas & Electric, supra*, there is no suggestion of any express or implied Congressional intent to preempt the states with regard to the siting of power plants, the determination of need for new generation or the regulation of environmental issues associated with such facilities in any of the federal statutes or regulations cited by the Petitioner. The state of Florida's exercise of its police powers to control the construction of new power plants, based on considerations of need, cost and environmental impact, is no less constitutionally permissible than the exercise by the state of California of its police powers to control the construction of new nuclear power plants based on many of the same considerations.

III.

Neither The FEECA Nor The Siting Act Creates A Discriminatory Burden On Interstate Commerce That Is Cognizable Under The Dormant Commerce Clause Doctrine

In New Smyrna's view, FEECA and the Siting Act discriminate in favor of Florida utilities that have an obligation to provide bundled retail electric service to customers within the state at the expense of in-state and out-of-state generators who have no such retail service obligation and sell power only in the wholesale market, on a contract basis. It is this alleged discrimination and the implied burden on interstate commerce that provide the linchpin for New Smyrna's final preemption theory. However, this theory is also fatally flawed.

In determining whether the state has placed an undue burden on interstate commerce, it must be borne in mind that the Constitution, when conferring upon Congress the power to regulate interstate commerce, never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect interstate commerce. Legislation, in a great variety of ways, may affect interstate commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. *Huron Portland Cement, supra*; *Collins v. American Buslines, Inc.*, 350 U.S. 528 (1956). The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). The Commerce Clause protects the interstate market, not particular interstate firms from prohibitive or burdensome regulations. *Exxon, supra*, quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

In *General Motors Corporation v. Roger W. Tracy, Tax Commissioner of Ohio*, 519 U.S. 278 (1997), this Court upheld the constitutionality of Ohio's imposition of a sales and use tax on natural gas purchases from gas producers and independent gas marketers while providing a tax exemption for natural gas purchases from state-regulated natural gas utilities. In rejecting the argument that denying a tax exemption to sales made by out-of-state independent marketers but not local distribution companies ("LDC's") violates the Commerce Clause, this Court reasoned as follows.

Any notion of discrimination under the commerce clause assumes a comparison of substantially similar entities. When

the allegedly competing entities provide different products, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. If the difference in products means that the entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed, eliminating the burden would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a state on its residents or resident competitors[26]. In *General Motors*, the LDC's bundled product was supplied to a core market — typified by residential customers to whom stability of rate and supply is important — that was neither susceptible to competition by the interstate sellers nor likely to be served except by regulated natural monopolies that had historically served its needs[27]. The Court concluded that, so far as this non-competitive market was concerned, competition would not be promoted by eliminating any tax differential between the sellers, and the dormant Commerce clause, therefore, had no job to do. The Court rejected the notion that the existence of competition between marketers and LDC's in the noncaptive market required treating those entities as alike for dormant Commerce Clause purposes[28]. The Court offered the following reasons its decision to attach greater significance to the distinctiveness of the captive market and the LDC's singular role in serving that market, and hence to treat marketers and LDC's dissimilar for Commerce Clause purposes.

---

26. 519 U.S. 278, 299.

27. *Id.* at 301.

28. *Id.* at 304.

> First and most important, we must recognize an obligation to proceed cautiously lest we imperil the delivery by regulated LDC's to the noncompetitive captive market. Second, as a court, we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve this captive market. Finally, should intervention by the National Government be necessary, Congress has both the resources and the power to strike the balance between the needs of the competitive and the captive market.[29]

In this case, Tampa Electric and the other Florida utilities who, like LDCs, have an obligation to provide bundled retail service to the public and, therefore, qualify as applicants under FEECA and the Siting Act, are not similarly situated with Duke and other independent power producers do not provide bundled retail electric service in Florida. The fact that Duke and other independent power producers must make a contractual committment to serve specific retail needs for power in order to justify as a co-applicant under FEECA and the Siting Act, does not establish a discriminatory burden on interstate commerce that is cognizable under the dormant commerce clause doctrine. While New Smyrna may argue that state regulated utilities that provide bundled retail electric service and independent power producers, such as Duke, compete with regard to wholesale electric sales, such competition is not sufficient to establish the similarity that is prerequisite to a finding of a burden on interstate commerce triggering a dormant Commerce Clause analysis.

---

29. *Id.* at 304.

CONCLUSION

For the foregoing reasons, the Court Should deny the Petition for Certiorari.

Respectfully submitted,

SHEILA MCDEVITT*
Vice-President and
General Counsel
HARRY W. LONG, JR.
Assistant General Counsel
TAMPA ELECTRIC COMPANY
Attorneys for Respondent
Tampa Electric Company
Post Office Box 111
Tampa, FL 33601-0111
(813) 228-1804

* *Counsel of Record*